

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2008 Session

IN RE: J.C.S.

**Appeal from the Chancery Court for Robertson County
No. 18951 Laurence M. McMillan, Jr., Chancellor**

No. M2007-02049-COA-R3-PT - Filed July 28, 2008

Mother appeals the trial court's denial of her request to regain custody of her son after she executed an Agreed Order transferring custody to the maternal grandparents. We affirm the trial court's finding that Mother signed the Agreed Order voluntarily with knowledge of the consequences and thereby she relinquished her superior right to custody. We also affirm the trial court's decision that having lost her superior custodial right, Mother was required to show a material change in circumstances warranting a revision in custody which she failed to do. We remand the matter to the trial court to set Mother's child support in accordance with the applicable child support guidelines.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed in Part and Vacated in Part**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Christine Brasher, Springfield, Tennessee, for the appellant, Mother.

Paul A. Rutherford, Nashville, Tennessee, for the appellees, Grandparents.

OPINION

This appeal concerns a mother's unsuccessful attempt to regain custody of her child after mother had signed an Agreed Order giving her mother and stepfather custody of the child.

The following facts are not in dispute. Mother and the child's father were divorced in March of 2002 in Robertson County Chancery Court. Their son was born in 1998. The Divorce Decree incorporated a Parenting Plan that gave Mother primary residential care of their son and gave father supervised visitation.

On August 4, 2004, Mother and the child's father signed an Agreed Order and revised Permanent Parenting Plan. The Agreed Order provided that "a substantial and material change of circumstances has arisen such that the best interests of the child would be served in modifying said Plan and placing custody with the maternal grandparents." The grandparents were awarded the "care and custody" of the child, with "reasonable visitation" awarded to each parent and other rights described in Tenn. Code Ann. § 36-6-101(a), such as health and educational information about the child and freedom from derogatory remarks about them in the child's presence. The Agreed Order was drafted by the grandparents' counsel, and Mother was not represented by counsel. The Agreed Order and revised Permanent Parenting Plan were filed in the divorce case.

A little over a year later, in October of 2005, the grandparents filed a Petition for Termination of Parental Rights and Adoption. This was filed as a new proceeding and was not filed in the divorce action. In the termination proceeding Mother then filed a counter-petition for custody of the child. According to Mother's counter-petition, she agreed to the Agreed Order so the child could attend a better school. She alleges that the grandparents have violated the Agreed Order by failing to allow her reasonable visitation and other personal contact with the child.

After a hearing on the grandparents' petition to terminate and Mother's counter-petition, the trial court entered its Final Order on August 27, 2007. First, the grandparents' petition to terminate parental rights was dismissed since they failed to show by clear and convincing evidence that the parents abandoned the child. This judgment was not appealed. The trial court also denied Mother's counter-petition, and that denial is the subject of this appeal.¹ The pertinent findings by the trial court on Mother's change of custody request are as follows:

¹We note that the parties asked the trial court in this case to interpret or modify the Agreed Order filed in the divorce proceeding. The grandparents wanted child support modified, while Mother asked for modified visitation. Under Tenn. Code Ann. § 36-6-101(b), jurisdiction to modify the Agreed Order remains in "the exclusive control of the court that issued such decree." As this court has stated:

As Tenn. Code Ann. § 36-6-101(b) clearly provides, the trial court which enters a domestic decree such as a permanent parenting plan concerning a minor child retains "exclusive control" for the purpose of modification of the decree. *See Cunningham v. Cunningham*, No. M2006-01187-COA-R3-CV, 2007 WL 1259209, at *5 (Tenn. Ct. App. April 30, 2007) (citing Tenn. Code Ann. § 36-6-101(b)); *see also Shepherd v. Metcalf*, 794 S.W.2d 348, 351 (Tenn. 1990); *Mayhew v. Mayhew*, 376 S.W.2d 324, 328 (Tenn. 1963); *Talley v. Talley*, 371 S.W.2d 152, 157 (Tenn. 1962). Because of the "exclusive control" provision afforded by Tenn. Code Ann. § 36-6-101(b), no court other than the court entering the initial domestic decree may modify the decree. *Snodgrass v. Snodgrass*, 357 S.W.2d 829, 833 (Tenn. 1962).

Hodge v. Hodge, M2006-01742-COA-R3-CV, 2007 WL 3202769, at *2 (Tenn. Ct. App. October 31, 2007).

While two separate cases, both the divorce proceedings wherein the Agreed Order was entered and Mother's counter-petition were before the same court, namely the Robertson County Chancery Court.

The Court finds that the Mother knowingly and voluntarily entered into the Agreed Order with knowledge of the consequences and therefore, the Court finds that the Agreed Order shall not be set aside.

Further, that the Mother has failed to demonstrate that a material change of circumstance exists which has an impact on the well-being of the minor child and, therefore, custody shall remain in the Grandparents.

Mother appeals claiming that the Agreed Order entered in the divorce case is invalid and insufficient to overcome the presumption of superior rights enjoyed by a parent. Alternatively, if the Agreed Order is found sufficient to overcome her superior rights, Mother appeals claiming that the trial court erred in failing to find that a material change in circumstances warranted a revision in custody.

I. SUFFICIENCY OF AGREED ORDER TO TRANSFER PERMANENT CUSTODY

Mother challenges the sufficiency of the Agreed Order to overcome her superior rights on several grounds. First, Mother argues that the Agreed Order is void since the trial court in the divorce proceeding lacked jurisdiction to modify the divorce decree by accepting the Agreed Order. Second, Mother argues that the Agreed Order was not final because it failed to adjudicate all of the substantive issues, particularly the issue of Mother's child support which was expressly reserved. Third, Mother argues that even if the Agreed Order is valid, it is, nevertheless, insufficient to defeat Mother's superior rights since the Agreed Order was intended only to give the grandparents temporary custody and was not a voluntary transfer of custody with knowledge of the circumstances.

Tennessee law recognizes that parents have superior right to their children in a custody dispute with non-parents. The "mechanics" of how this superior right operates under Tennessee law is succinctly described in *In re B.C.W.*;

At the outset, it must be noted that the standard applied to custody disputes between parents and non-parents is very different from the standard applied to disputes involving two parents. In disputes between legal parents, trial courts determine a child's best interests in light of the comparative fitness of the parents. *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005); *Parker v. Parker*, 986 S.W. 2d 557, 562 (Tenn. 1999); *Bah v. Bah*, 668 S.W.2d 663, 665-66 (Tenn. Ct. App. 1983). In custody disputes between parents and non-parents, the comparative fitness analysis cannot be used because it fails to take into account that the custody claims of biological parents and the custody claims of third parties do not have the same legal weight. *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). The Tennessee Supreme Court has held that the Tennessee Constitution protects a natural parent's fundamental right to have the care and custody of his or her children. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002); *Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). Parental rights are superior to the rights

of others and continue without interruption unless a parent consents to relinquish them, abandons the child, or forfeits parental rights by conduct that substantially harms the child. *Blair*, 77 S.W.3d at 141; *O’Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995).

Courts deciding initial custody disputes must give natural parents a presumption of “superior parental rights” regarding the custody of their children. *Blair*, 77 S.W.3d at 141. In an initial custody dispute involving a parent and a non-parent, a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child. *In re Adoption of Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995). The non-parent has the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the parent. *Ray*, 83 S.W.3d at 732-33; *Hall v. Bookout*, 87 S.W.3d 80, 86 (Tenn. Ct. App. 2002). It is only after a clear showing of substantial harm that a court may engage in a “best interest of the child” analysis. *In re Adoption of Female Child*, 896 S.W.2d at 548.

2008 WL 450616, at *2-3.

The Tennessee Supreme Court recently discussed the standard to be applied when parents are seeking to modify a valid order that placed custody of their children with a non-parent.

In an initial proceeding, natural parents have superior right in relation to non-parents who are seeking custody under article I, section 8 of the Tennessee Constitution. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). But “absent extraordinary circumstances,” parents are not entitled to superior rights when seeking to *modify* a valid order placing custody with a non-parent “even when that order resulted from the parent’s voluntary relinquishment of custody to the non-parent.” *Id.* at 143. Despite this rule, we have recognized four circumstances in which a natural parent continues to enjoy a presumption of superior rights to custody:

- (1) When no order exists that transfers custody from the natural parent;
- (2) When the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent;
- (3) When the order transferring custody from the natural parent is invalid on its face; and
- (4) When the natural parent cedes only temporary and informal custody to the non-parents.

Recognizing the possibility that in the informal setting of juvenile court unrepresented parents could enter into a formal order without understanding the

actual effect of transferring custody, we have explained that it is only a parent's "voluntary transfer of custody to a non-parent, *with knowledge of the consequences of that transfer*," that will defeat a parent's claim to superior rights of custody. *Id.* at 147 (emphasis added).

In re Adoption of A.M.H., 215 S.W.3d 793, 811 (Tenn. 2007) (emphasis original).

First, Mother argues that the Agreed Order wherein both parties to the proceeding asked the court to modify the Parenting Plan that governs who is the primary residential parent or guardian and the parenting arrangement is somehow insufficient to invoke the court's jurisdiction. Mother cites *Hodge v. Hodge*, M2006-01742-COA-R3-CV, 2007 WL 3202769, at *2 (Tenn. Ct. App. October 31, 2007) (no Tenn. R. App. P. 11 application filed), for the proposition that once a divorce and parenting plan order that has adjudicated the parties' rights has become final, the trial court lacks jurisdiction to adjudicate matters formerly in dispute since the court acted *sua sponte*. *Hodge* makes it clear that jurisdiction would have existed if the parties had invoked the court's jurisdiction. *Id.* at *3. Since in the case before us the parties approached the court themselves, we do not find that it lacked subject matter jurisdiction to enter the Agreed Order revising the Parenting Plan.

With regard to Mother's second issue, Mother cites no authority for the proposition that reserving a child support issue when the parent received notice of the proposed order in any way affected the validity of the order itself. The case cited by Mother, *In Re B.C.W.*, M2007-00168-COA-R3-JV, 2008 WL 450616, (Tenn. Ct. App. Feb. 19, 2008), is not on point as it dealt with an order granting a non-parent custody without notice to the child's father.

Finally, Mother argues that the Agreed Order is not sufficient to overcome her superior right as a parent because the Agreed Order was not a voluntary transfer of custody with knowledge of the consequences as required in *In re Adoption of A.M.H.*, discussed above.

The trial court heard evidence that Mother was 25 years old at the time she signed the Agreed Order and Permanent Parenting Plan. Mother testified that she was represented by counsel in her divorce proceeding and understood the significance of the custody designation in the Parenting Plan filed therein. The grandmother testified that Mother was advised when presented with the Agreed Order that she could obtain her own attorney which she refused. Mother maintained that she thought the arrangement was only temporary and not permanent and was done only so her son could be enrolled in better schools. However, she acknowledged that neither the Agreed Order nor revised Permanent Parenting Plan provided that it was temporary. The grandparents, on the other hand, both testified that the Agreed Order was not represented to be temporary. According to them, the child had been with them the majority of the time since his birth. Mother admits she read both the Agreed Order and Permanent Parenting Plan before she signed them. The child's father testified that he understood the significance of the Agreed Order and its effect on his ability to get custody of the child.

It would, of course, have been preferable for the Agreed Order to expressly state that Mother was voluntarily giving the grandparents custody such that her superior parental rights were relinquished. While preferable, it is not a requirement if the evidence supports the finding that Mother signed the Agreed Order understanding its consequences. Given the evidence about the considerable time spent by the child with grandparents before the Agreed Order and other evidence presented, the trial court was presented with evidence to support the conclusion that Mother understood the consequences of the Agreed Order and that her alleged belief that the arrangement was temporary is not supported by the evidence.²

II. MATERIAL CHANGE IN CIRCUMSTANCE WARRANTING CUSTODY REVISION

Mother also argues that even if the Agreed Order is sufficient to relinquish her superior right, the trial court erred in failing to find a material change in circumstances, namely that the grandparents interfered with Mother's ability to visit the child. Because children are more likely to thrive in a stable environment, the courts favor maintaining existing custody arrangements. *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Kellett v. Stuart*, 206 S.W.3d 8, 14 (Tenn. Ct. App. 2006); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft*, 19 S.W.3d at 828.

Nonetheless, a custody and visitation order, or the residential schedule in a permanent parenting plan, may be modified in certain situations. Such an order remains within the control of the court and is subject to "such changes or modification as the exigencies of the case may require." Tenn. Code Ann. § 36-6-101(a)(1). Both the legislature and the courts have addressed the requirements for a such modification, in recognition of the fact that the circumstances of children and their parents change, sometimes requiring changes in the existing parenting arrangement. When a petition to change custody is filed, the parent seeking the change has the burden of showing that a material change in circumstances has occurred which makes a change in custody in the child's best interest. *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002); *In re M.J.H.*, 196 S.W.3d 731, 744 (Tenn. Ct. App. 2005); *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001).

A decision on a request for modification of a parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A party petitioning to change an existing custody order must prove both (1) that a material change of circumstances has occurred and (2) that a change of custody or residential schedule is in the child's best interest. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 575 (Tenn. 2002). Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the

²For all intents and purposes, the grandparents had been raising the child. There was evidence presented that prior to the Agreed Order, Mother would threaten to retrieve the child from his grandparents' home when they refused to loan her money.

best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d at 150; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006).

As to the first requirement, *i.e.*, a material change of circumstances, the Tennessee Supreme Court has stated:

Although there are no bright line rules as to whether a material change in circumstances has occurred after the initial custody determination, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston, 106 S.W.3d at 644 (citing *Kendrick*, 90 S.W.3d at 570).

The General Assembly has also addressed the question of what constitutes a material change of circumstances:

(B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

Only if a material change of circumstances is shown to exist is the trial court to proceed to the next step of the analysis: whether modification of the existing parenting arrangement is in the child's best interest. *Cranston*, 106 S.W.3d at 644; *Kendrick*, 90 S.W.3d at 569; *Curtis*, 215 S.W.3d at 840. That determination requires consideration of a number of factors, including those set out in Tenn. Code Ann. § 36-6-106(a) (factors to consider in custody determination) and Tenn. Code Ann. § 36-6-404(b) (factors to consider in establishing a residential schedule).

The trial court's finding that Mother failed to prove a material change in circumstances to satisfy the threshold issue of whether a material change has occurred is supported by the record in this case. Mother is correct that courts have found that interference with visitation can constitute a material change in circumstances. *See Birdwell v. Harris*, M2006-01919-COA-R3-JV, 2007 WL 4523119, at *6 (Tenn. Ct. App. Dec. 20, 2007) (no Tenn. R. App. P. 11 application filed); Tenn. Code Ann. § 36-6-101(a). However, at trial the grandparents denied that they interfered with

Mother's visitation, and the evidence does not preponderate against the trial court's implicit finding that there was no significant interference that affected the child's well-being in a meaningful way. Additionally, Mother herself testified that the grandparents' interference was not new and had started when the child was born. Consequently, the trial court's conclusion that there was no material *change* in circumstances after the Agreed Order was also supported by the record.

We find the trial court did not err when it failed to find that a material change of circumstances had occurred that warranted inquiry into a revision in custody.

III. CHILD SUPPORT

The grandparents appeal the trial court's ruling on Mother's child support which was set at \$150 per month. The grandparents argue that the trial court erred by failing to apply the child support guidelines under Tenn. Code Ann. § 36-5-101(a)(1)(A). The trial court declined to do so citing absence of proof in the record of Mother's income. Mother, however, did testify about her income.

Finding that the trial court erred in failing to do so, we remand this case to the trial court to determine Mother's child support in accordance with the applicable guidelines.

IV. CONCLUSION

The trial court is affirmed as to its decision to leave undisturbed the custody arrangement agreed to by the parties in the Agreed Order. The judgment regarding child support is vacated, and the case is remanded to the trial court for consideration of Mother's child support in accordance with the applicable child support guidelines.

Costs of this appeal are taxed against appellant, Mother, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.